No. 425A18 DISTRICT 16-A

SUPREME COURT OF NORTH CAROLINA

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HAMLET H.M.A., LLC D/B/A SANDHILLS REGIONAL MEDICAL CENTER, Plaintiff-Appellant, v. PEDRO HERNANDEZ, M.D., Defendant-Appellee.	)	From Richmond County

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BRIEF OF AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF DEFENDANT-APPELLEE

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BRIEF OF AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF DEFENDANT-APPELLEE [1]

****

[1] No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. See N.C. R. App. P. 28(i)(2).

ISSUE PRESENTED

North Carolina's Unfair and Deceptive Practices Act bans unfair and deceptive practices in connection with commercial activities. This ban does not apply, however, to "professional services rendered by a member of a learned profession." The statute thus draws a contrast between engaging in commercial activity and rendering professional services.

The issue presented is:

Does the learned-profession exemption apply when a professional engages in commercial conduct that does not involve the application of any professional expertise?

INTRODUCTION

The Unfair and Deceptive Practices Act was enacted to protect the North Carolina public from unscrupulous business practices. The General Assembly designed this landmark consumer-protection legislation to have expansive reach: It applies to nearly any kind of commercial activity.

The Act's ban on unfair and deceptive commercial practices does have a few exemptions, but they are narrowly drawn. At issue here is the exemption for members of so-called "learned professions," such as lawyers and medical doctors, when they "render" "professional services." N.C. Gen. Stat. § 75-1.1(b). By its terms, this exemption applies only when a claim arises directly out of a person's delivery of services that involve unique professional skills or knowledge.

This Court has not yet had occasion to address the exemption's scope. In a series of decisions, however, the Court of Appeals has construed the exemption far more broadly than General Assembly ever intended. In particular, the exemption has been construed to cover anything that merely affects professional services. Applying that standard, the exemption has operated to immunize a wide swath of commercial activities engaged in by professionals—including activities that the General Assembly specifically

designed the Act to regulate, such as deceptive advertising and abusive debt-collection practices. In some cases, courts have applied the exemption to categorically bar all unfair-and-deceptive practices claims against learned professionals.

Fortunately, in the decision below, the Court of Appeals took an important step toward construing the exemption in line with its text and original intent. Specifically, the Court held that the exemption does not apply to a contract dispute between a hospital and a medical doctor. As the Court rightly observed, a defendant may successfully invoke the exemption only when she is accused of violating the Act while "render[ing]" "professional services." Id. Because doctors do not render medical services when they negotiate business deals with hospitals, the Court of Appeals correctly held that the exemption does not apply here.

For these reasons, the State of North Carolina, acting through Attorney General Joshua H. Stein, respectfully requests that this Court affirm the decision below. The State further requests that this Court construe the learned-profession exemption in a way that aligns with the exemption's text, as well as the Act's animating purpose: to protect the North Carolina public from unfair and deceptive business practices.

ARGUMENT

I. The Act Broadly Protects North Carolina Consumers From Unfair And Deceptive Business Practices.

The Unfair and Deceptive Practices Act bans all "[u]nfair methods of competition" and "unfair or deceptive acts or practices" that are "in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a).

The Act allows victims of these practices to enforce the statute's provisions through a private lawsuit. Id. § 75-16. It also vests the Attorney General with broad authority to enforce the law to protect North Carolina consumers. See id. §§ 75-9, -10, -12, -13, -14, -15, -15.2.

When the Act was enacted in 1969, then-Attorney General Robert Morgan was one of the law's main proponents.[2] Soon thereafter, the Attorney General brought a groundbreaking lawsuit to enjoin retailer J.C. Penney from engaging in abusive debt-collection practices. See State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 317–18, 233 S.E.2d 895, 899-900 (1977). This Court rejected the lawsuit, however, concluding that the Act does not apply to debt collection. Id. at 318, 233 S. E.2d at 899. The Court

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[2] Robert Morgan, The People's Advocate in the Marketplace – The Role of the North Carolina Attorney General in the Field of Consumer Protection, 6 Wake Forest Intramural L. Rev. 1, 18-20 (1969).

observed that the law only bans unfair and deceptive practices that involve "commerce." It reasoned that the term "commerce" includes only transactions that arise from "buyer-seller relationships," not "debtor-creditor relationships." Id. at 317-18, 233 S.E.2d at 800.

The Court invited the legislature to override its J.C. Penney decision, if the legislature had intended the Act to sweep more broadly. Id. at 320, 233 S.E.2d at 901 ("Obviously if we have not properly interpreted G.S. 75-1.1, our General Assembly may amend the statute").

The General Assembly promptly took up that invitation: it responded by immediately amending the Act to expand its reach.[3] The 1977 amendments did so in two ways that are relevant here. First, the amendments supplanted J.C. Penney's specific holding by explicitly banning abusive debt-collection practices. See N.C. Gen. Stat. §§ 75-51 to -55.[4]

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[3] The J.C. Penney decision was issued in late April, 1977. The amendments were enacted in June of that year. Act of June 27, 1977, ch. 747, secs. 1-2, 5, 1977 N.C. Sess. Laws 984, 987. As many courts have observed, this sequence reflects that the 1977 amendments were specifically intended to override J.C. Penney. E.g., United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), aff'd, 649 F. 2d 985 (4th Cir. 1981).

[4] Because the Act has not been amended in any way relevant here since 1977, the amendments constitute the current version of the statute. Thus, when this brief discusses the 1977 amendments, it cites to the Act as it is currently codified.

Second, the General Assembly overrode J.C. Penney's narrow definition of the word "commerce." Specifically, the 1977 amendments defined the term to "include[ ] all business activities, however denominated." N.C. Gen. Stat. § 75-1.1(b). With this expanded definition, the 1977 amendments ensured sweeping protections against unfair and deceptive business practices in our State. See Bhatti v. Buckland, 328 N.C. 240, 245-46, 400 S.E.2d 440, 443-44 (1991) (noting that the 1977 amendments were designed to broaden the Act's scope).

II. The Learned-Profession Exemption Was Designed To Apply Only To Claims That Directly Involve The Rendering Of Professional Services.

As part of the 1977 amendments, the General Assembly also included two exemptions to the Act's expanded definition of "commerce": one for newspapers and other media organizations, and one for members of a "learned profession." N.C. Gen. Stat. § 75-1.1(b)-(c). This case turns on the scope of the latter exemption for learned professionals.

The 1977 amendments crafted the learned-profession exemption by carving out a narrow limit to the Act's otherwise expansive definition of "commerce." Specifically, the amendments clarified that the term "commerce . . . does not include professional services rendered by a member

of a learned profession." Id. § 75-1.1(b). The amendments further made clear that the "party claiming to be exempt . . . shall have the burden of proof with respect to such claim." Id. § 75-1.1(d).

Thus, under the statute, the exemption supplies a defense only when a defendant satisfies both a status element and a conduct element. The defendant must prove that:

1. she is "a member of a learned profession," and that
2. the allegedly unfair or deceptive conduct constituted the "render[ing]" of "professional services."

Id.

As shown below, these requirements were designed to apply in only narrowly circumscribed circumstances: When a professional (1) uses her unique skills or knowledge (2) to provide "services" to a client, (3) in a way that benefits the general public.

A. The Attorney General's Opinion Shows That the Exemption Was Designed to Be Narrow.

While the General Assembly was deliberating over the 1977 amendments, the Attorney General submitted a formal opinion to the legislature to clarify the learned-profession exemption's scope. See 47 Op.

N.C. Att'y Gen. 118, 118 (1977) [App. at 2]. The Attorney General's opinion is particularly instructive here, because the legislature used the opinion "as a guide" when it voted to enact the exemption into law. Id.[5]

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[5] The Attorney General's opinion warrants special interpretative weight, for three additional reasons.

- First, "the Attorney General's office . . . introduced and promoted" the 1977 amendments, including "the [learned-profession] exemption." 1 Noel L. Allen, N.C. Unfair Business Practice § 14.03, at 14-8 (3d ed. 2018). Based on the original Act's similar history, this Court has recognized that the Attorney General's views have unique value. See J.C. Penney, 292 N.C. at 317-18, 233 S.E.2d at 899-900 (relying on Attorney General Morgan's "contemporaneous article" that "expressed his views" on the original Act's scope and purpose").
- Second, the opinion was specifically requested by a member of the General Assembly, Representative Robert Farmer, to help him understand the exception's scope. See Att'y Gen. Op. at 118. That history strongly suggests that legislators actually relied on the opinion when they voted to approve the exemption.
- Third, the Attorney General's opinion appears to be the sole piece of legislative history on the scope of the exemption. Cf. Susan W. Mason, Trade Regulation -- The North Carolina Consumer Protection Act of 1977, 56 N.C. L. Rev. 547, 553 (1978). Thus, other than the text itself, the opinion provides the only insight on the General Assembly's understanding of the exemption's scope.

Indeed, treatise-writers and courts alike have observed that the Attorney General's opinion "shed[s] significant light on the legislative intent" of the exemption. Allen, N.C. Unfair Business Practice § 14.03, at 14-8; see Reid v. Ayers, 138 N.C. App. 261, 267, 531 S.E.2d 231, 236 (2000) (citing the opinion with approval); cf. Delconte v. State, 313 N.C. 384, 387 n.3, 329 S.E.2d 636, 639 n.3 (1985) (Attorney General opinions are usually afforded "some weight").

As the Attorney General's opinion explained, the Act does not explicitly define the term "learned profession." Id. However, the General Assembly passed the statute against the backdrop of a wide body of existing law that supplied the term's meaning.[6] Under that law, a learned profession includes three features: the "need of unusual learning," the "existence of confidential relations," and "adherence to a standard of ethics higher than that of the marketplace." Id. (quoting Commonwealth v. Brown, 20 N.E.2d 478, 481 (Mass. 1939)). Applying that definition, courts have "traditionally" confined the term to "physicians, attorneys, clergy, and related professions." Id. These professions were entitled to special treatment under consumer-protection law, because "historically, [they] were characterized by a spirit of public service . . . and the pursuit of the learned act . . . even with no expectation of [financial] reward."[7]

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[6] Thus, the opinion applied "[t]he age-old principle that words undefined in a statute are to be interpreted and applied according to their common-law meanings." Antonin Scalia & Bryan Garner, Reading Law 320 (2012); see Neder v. United States, 527 U.S. 1, 23 (1999) (Congress is presumed to "intend[ ] to incorporate the well-settled meaning of the common-law terms it uses"); State v. Benton, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (The legislature is presumed to act "with full knowledge of . . . existing law.").

[7] Debra D. Burke, The Learned Professional Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line, 15 Campbell L. Rev. 223, 243 (1993).

The Attorney General's opinion went on to explain that even after a defendant meets her burden to prove that she belongs to a learned profession, she must also prove that "the conduct in question [was] a rendering of professional services." Id. at 118-19.

To satisfy this conduct requirement, the defendant must make three independent showings.

First, the challenged activity must have involved "unusual learning" that is unique to the profession. Id. at 119. (quoting Brown, 20 N.E.2d at 481). Thus, "it is only those activities which distinguish an individual as a member of a profession which are protected by" the exemption. Id. For example, an attorney who engages in fraud while selling a personal item could not invoke the exception, because that conduct does not require specialized legal skill or knowledge. Likewise, an attorney who misrepresents her academic credentials could not invoke the exemption, because she did not exercise any specialized knowledge or training when she conveyed that false information.

Second, the conduct must have taken place in the context of a "confidential relationship." Id. (quoting Brown, 20 N.E.2d at 481). In other words, the exemption applies only when the challenged activity constituted the "performance of professional services on behalf of a client." Id. This

requirement stems from the exemption's limit to "services" that are "rendered." The plain meaning of the word "service" is an activity that involves "the performance of work commanded or paid for by another." Webster's Third New Int'l Dictionary 2074 (1971).[8] Likewise, to "render" means to "do (a service) for another" or to "give (help) to another." Id. at 1922. Therefore, this Court has elsewhere construed the term "professional services" to require "a professional relationship between the parties." Barger v. McCoy Hillard & Parks, 346 N.C. 650, 665, 488 S.E.2d 215, 224 (1997) (construing N.C. Gen. Stat. § 1-15(c)).[9]

Thus, for example, a medical doctor could not invoke the exemption if she knowingly provides false information in a commercial presentation to

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[8] This Court has regularly used "'standard, nonlegal dictionaries' as a guide" when it interprets undefined statutory terms. C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990) (citing Webster's Third New International Dictionary).

This brief cites definitions from dictionaries in use in the late 1960's and early 1970's—the era when the relevant statutes were enacted. See Victor v. Nebraska, 511 U.S. 1, 12 (1994) ("contemporary dictionaries" should be used construe the meaning of statutory language); Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (using the 1981 version of Webster's Third New International Dictionary to construe a statute passed in 1982).

[9] Commentators have also observed that the exemption applies only to "special relationships of trust and confidence." Burke, 15 Campbell L. Rev. at 253; see Allen, N.C. Unfair Business Practice § 14.03, at 14-7 (same).

boost sales of a pharmaceutical drug. That activity requires specialized skill and knowledge, but lacks any identifiable confidential relationship. Likewise, the exemption does not apply to claims between learned professionals, unless one is performing a professional service on behalf of the other. So an attorney could not invoke the exemption if, for example, she engaged in deceptive practices while negotiating a business contract with another lawyer.

Third, the exemption does not apply to activities that are purely commercial. Att'y Gen. Op. at 119. As the Attorney General opinion explains, the defining feature of a learned profession is a commitment to public service. Id. Unlike ordinary business activities, "enhancing profit is not a goal of professional activities; the goal is to provide services necessary to the community." Id. (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1979)). Thus, an activity is only "professional" in the relevant sense if it requires "adherence to a standard of ethics higher than that of the marketplace." Id. (quoting Brown, 20 N.E.2d at 481). For example, lawyers and medical doctors must follow professional ethical standards when they

give legal advice or provide medical treatment—even when those standards constrain their pursuit of profit.[10]

Of course, as the Attorney General opinion also recognizes, learned professionals "regularly engage in activities other than performance of professional services." Id. But the exemption applies only to "the public service aspect"—and not to the "business aspect"—of professional practice. Goldfarb, 421 U.S. at 787. That is, as one commentator explains, the exemption "provides no protection against liability for unfair or deceptive practices in 'commercial' activities engaged in by professionals." Mason, 56 N.C. L. Rev. at 552-53.[11]

For example, as the Attorney General opinion emphasizes, the exemption does not shield professionals from claims based on deceptive advertising. Att'y Gen. Op. at 119. Nor would the exemption immunize a

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[10] See N.C. Code of Prof'l Responsibility r. 0.1[1] ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."); A.M.A. Code of Medical Ethics, preamble ("The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society.").

[11] This Court has previously considered the views of "contemporary commentators" to construe the scope of the original 1969 Act. J.C. Penney, 292 N.C. at 318, 233 S.E.2d at 900.

price-fixing arrangement among professionals. Id. After all, billing and advertising are commercial activities that stand "apart from [the] actual performance of professional services." Id. (citing Bates & O'Steen v. State Bar of Ariz., 433 U.S. 350 (1977)). The same rule applies to the other ordinary business aspects of operating a professional practice—such as contract negotiations over a lease or an employment relationship. All of these activities are fundamentally commercial in nature. And, at least for most professionals, these kinds of commercial activities do not feature any distinctive professional skills, knowledge, or values.

In sum, the Attorney General's opinion confirms that the scope of the learned-profession exemption is quite narrow. The exemption applies only when a learned professional (1) exercises specialized skills, (2) on behalf of a client, (3) to provide services that benefit the general public. By contrast, when professionals merely engage in ordinary business activities, the Act continues to protect consumers from unfair and deceptive practices.

B. The General Assembly Enacted the Exemption to Exclude Claims for Professional Malpractice.

By narrowly crafting the learned-profession exemption in the ways just described, the General Assembly had a specific kind of claim in mind that it

meant to exclude from the Act's coverage: claims for professional malpractice.

The legislative history shows that the General Assembly explicitly designed the exemption to have this narrow effect. During legislative deliberations over the 1977 amendments, some members of the Senate Judiciary Committee became concerned that the Act, as amended, "might have a severe impact upon legal and medical professions." Att'y Gen. Op. at 118. These legislators observed that the Act's broad definition of "commerce" could, standing alone, be construed to include professional activities—such as a doctor treating a patient or a lawyer counseling a client. See id. The legislators expressed concern that the amendments would therefore impose treble damages on routine professional-malpractice claims. To avoid this result, the Committee proposed the learned-profession exemption "to make certain that poor performance by an attorney on behalf of his client could not be characterized as an unfair commercial practice." Id.

With this concern in mind, the General Assembly designed the exemption to apply only when a consumer might otherwise have a malpractice claim—that is, when she received deficient "professional services" in the context of a confidential relationship. Commentators have

also recognized that the exemption's "narrow language" had the purpose and effect "merely to preclude the possibility of professional malpractice suits under [the Act]." Mason, 56 N.C. L. Rev. at 553; see Burke, 15 Campbell L. Rev. at 241 (same).

In sum, the General Assembly's specific purpose in enacting the learned-profession exemption was to exclude malpractice claims from the Act's coverage. That purpose serves as an important interpretive guide when construing the exemption's scope. See Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 551, 809 S.E.2d 853, 861 (2018) (explaining that a statute's purpose should be considered when construing its scope).[12]

C. Decisions By State Courts Outside of North Carolina Further Confirm the Exemption's Narrow Scope.

This Court has previously relied on decisions by courts of other states to shed light on the proper interpretation of the Act. For example, in Marshall v. Miller, this Court held that the Act does not require a plaintiff to

[12] See also e.g., O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) ("The Court may consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute."); Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002) ("The primary goal of statutory construction is to effectuate the purpose of the legislature.").

show that the defendant's unfair or deceptive conduct was in bad faith. 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). To reach this ruling, the Court relied on the fact that "state courts have generally ruled" that bad faith is not required "under th[ose] states' unfair and deceptive practices acts." Id.; see also, e.g., Hardy v. Toler, 288 N.C.300, 308-09, 218 S.E.2d 342, 346 (1975) (relying on out-of-state decisions to construe the Act).

Here, both Maryland and Texas have statutory exemptions that closely mirror the Act's learned-profession exemption. Like the Act, the laws in those states exempt a learned professional's conduct only when the claim arises out of "the rendering of a professional service." Tex. Bus. & Com. Code § 17.49(c); see Md. Code Ann. Com. Law § 13-104(1) (exempting "professional services" provided by members of certain professions). Given the close overlap between those states' laws and our own, the decisions of their courts are instructive on the interpretive issue here. These cases confirm that the learned-profession exemption should be narrowly construed.[13]

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[13] Iowa and the District of Columbia also have consumer-protection statutes that exempt some claims against learned professionals. The Iowa exemption is not instructive here, however, because it is far broader than North Carolina's. It exempts all claims against learned professionals, with no separate conduct requirement. Iowa Code § 714H.4. Although the District of Columbia's exemption is similar to North Carolina's, see D.C. Code § 28-3903(c)(2)(C), it has not been examined by that jurisdiction's courts.

For example, Maryland's highest court has ruled that the term "professional services" includes only activities that require specialized skills or knowledge. Scull v. Groover, 435 A.3d 1186, 1195-96 (Md. 2013). In Scull, the Court faced the question whether a hospital could invoke the learned-profession exemption to defeat a claim related to its billing practices. Id. at 1187. The Court answered that the exemption does not apply in those circumstances. It explained that the exemption "applies only to the actual professional services of a physician," whereas "[t]he commercial aspects of a medical practice, such as [medical billing practices], are not exempt." Id. at 1197. In addition, the Court explicitly rejected the hospital's argument that the term "professional services" means anything that merely "related to" the profession. Id. Instead, professional services are only those activities that directly require a professional to exercise her unique knowledge or skills. Id.

The Texas appellate courts have likewise held that the state's learned-profession exemption applies only to activities where it was "necessary for the professional to use his specialized knowledge or training." Atl. Lloyd's Ins. Co. v. Susman Godfrey, L.L.P., 982 S.W.2d 472, 477 (Tex. App. 1998). Thus, for the exemption to apply, the claim "must arise out of acts particular to the individual's specialized vocation." Id. at 476-77.

Applying this standard, the court held that an attorney "d[oes] not render professional services" when she sends a client-solicitation letter. Id. After all, soliciting clients does not involve "skills solely belonging to the legal profession," such as "drafting pleadings," "analyzing caselaw," or giving "legal advice." Id. Rather, by seeking "new business," the letter at issue merely sought "the opportunity to offer professional services." Id.

In sum, the Maryland and Texas appellate courts have sensibly interpreted their states' learned-profession exemptions to apply only to conduct that requires specialized professional training. That is, the exemptions cover physicians only when they provide medical care, Scull, 76 A.3d at 1197, and cover lawyers only when they provide legal services, Atlantic Lloyd's, 982 S.W.2d at 477. These rulings reinforce that a narrow reading of North Carolina's similar exemption is also warranted here.

D. Other Sources of Law Confirm That the Exemption Should Be Construed to Advance the Act's Consumer-Protection Purpose.

As shown above, the General Assembly designed the learned-profession exemption to apply in only a narrow set of circumstances. To invoke the exemption, a person must be a learned professional, and the claim must arise from the rendering of professional services. Thus, a

professional cannot escape liability under the Act when she engages in an unfair or deceptive business practice.

This reading of the exemption is confirmed by two interpretative presumptions that apply here.

First, the Act is a remedial statute. Thus, the Act's protections must be construed broadly to achieve the statute's overall purpose to protect the public from unscrupulous business practices. Likewise, for this same reason, the Act's exemptions must be construed narrowly.

Second, the Act is patterned after a federal statute, the Federal Trade Commission Act. Thus, case law interpreting the FTC Act, and related laws, bear on this Court's analysis. Those cases likewise point against construing the exemption in a way that would insulate professionals from liability for their unfair or deceptive commercial activities.

1. The Act is a remedial statute that must be construed to achieve its public purpose.

Under North Carolina law, "a remedial statute must be construed broadly." Wilkie, 370 N.C. at 545, 809 S.E.2d at 857. This broad construction should be applied "liberally" in order "to accomplish the purpose of the Legislature and to bring within [the statute] all cases fairly falling within its

intended scope." Stillwell Enter. v. Interstate Equip. Co., 300 N.C. 286, 293, 266 S.E.2d 812, 817 (1980) (quoting Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973)).

A remedial statute is one that is enacted to promote the public welfare by providing a streamlined remedy for individuals to vindicate their rights. Smith v. Mercer, 276 N.C. 329,338, 172 S.E.2d 489, 495 (1970); see also O & M Indus., 360 N.C. at 268, 624 S.E.2d at 348. Thus, a remedial statute seeks to "encourag[e] private enforcement" by stripping away procedural and other legal obstructions that harm the public welfare. Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981). For example, the General Assembly will often enact a remedial statute when it identifies defects in the common law that have prevented private citizens from using lawsuits to recover for legal wrongs committed against them. Id.

Applying these standards, this Court has squarely held that the Act is a remedial statute whose consumer protections must be construed broadly. Bhatti, 328 N.C. at 245, 400 S.E.2d at 443; Marshall, 302 N.C. at 546, 276 S.E.2d at 402. As the Court explained shortly after the 1977 amendments were enacted, the "legislation was needed because common law remedies had proved often ineffective" to protect consumers from unfair and

deceptive commercial practices. Marshall, 302 N.C. at 543, 276 S.E.2d 397, 400. For example, "[t]ort actions for deceit . . . and fraud involved a heavy burden of proof," including the burden to show that the deceptive conduct was intentional. Id. at 543-44, 276 S.E.2d at 400. Contract claims, meanwhile, "also entailed burdensome elements of proof" and could be defeated by a litany of technical defenses, like the parol evidence rule. Id. at 544, 276 S.E.2d at 400.

To strip away these obstacles, the legislature created a streamlined statutory cause-of-action for unfair and deceptive commercial practices. Id. As a result, "a cause of action under the Act is easier to establish than those available under the common law." Burke, 15 Campbell L. Rev. at 236. The legislature also specifically "designed [the Act] to encourage private enforcement." Id. at 239. For example, by allowing plaintiffs to seek treble damages and attorney's fees, the Act "make[s] it economically feasible to bring a cause of action," even when actual damages are limited or recovery is uncertain. Id.

All of these features confirm that the Act is a remedial statute. Bhatti, 328 N.C. at 245, 400 S.E.2d at 443. Under this Court's precedent, the Act therefore must be interpreted "liberally" to achieve the statute's central aim:

to provide a remedy to consumers who are victims of unfair and deceptive commercial practices. Stillwell, 300 N.C. at 293, 266 S.E.2d at 817.

As a necessary corollary, the Act's exemptions must be narrowly construed. See Maready v. City of Winston-Salem, 342 N.C. 708, 730, 467 S.E.2d 615, 629 (1996) (narrowly construing exceptions to the open meetings law). North Carolina courts have established a general "rule of statutory construction that exemptions must be construed narrowly." Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 175 N.C. App. 309, 313, 623 S.E.2d 315, 318, aff'd, 360 N.C. 641, 636 S.E.2d 564 (2006); see also News & Observer Pub. Co. v. Interim Bd. of Ed. for Wake Cty., 29 N.C. App. 37, 47, 223, S.E.2d 580, 586 (1976) ("Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws.") (citing 73 Am. Jur. 2d, Statutes § 313, 463-64 (1974)).

Likewise, federal courts have uniformly "recognize[d] the general rule of construction that exemptions from remedial statutes are to be construed narrowly." Olsen v. Lake Country, Inc., 955 F.2d 203, 206 (4th Cir. 1991). As the U.S. Supreme Court has observed, such exemptions must be "read narrowly in order to preserve the primary operation of the policy" that the statute was enacted to advance. City of Edmonds v. Oxford House, Inc., 514

U.S. 725, 731-32 (1995). After all, an unduly broad construction of a statute's exemptions can frustrate the law's remedial purpose in the same way as an unduly stringent construction of the statute's primary provisions. See id. Thus, exemptions to remedial statutes apply only to parties who are "plainly and unmistakably within the exemptions' terms and spirit." Calderon v. GEICO Gen. Ins. Co., 809 F.3d 111, 120 (4th Cir. 2015). Federal courts across the nation have applied this rule to numerous remedial federal laws.[14]

This interpretive rule applies here for another reason as well: the Act explicitly places the burden of proving that the exemption applies on the party who invokes it. N.C. Gen. Stat. § 75-1.1(d). As this Court has held, the General Assembly's decision to place the burden of proof in this way reflects a legislative direction for courts to construe an exemption "strictly." Maready, 342 N.C. at 730, 467 S.E.2d at 629.

2. The FTC Act also shows that the exemption here should be narrowly construed.

As this Court has also recognized, the General Assembly explicitly designed the Act to "parallel and supplement" a federal statute, the Federal

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[14] See, e.g., Edmonds, 514 U.S. at 731-32 (Fair Housing Act); Calderon, 809 F.3d at 120 (Fair Labor Standards Act); Olsen, 955 F.2d at 206 (Interstate Land Sales Full Disclosure Act).

Trade Commission Act. Marshall, 302 N.C. at 543, 276 S.E.2d at 400. Indeed, this intentional overlap was so extensive that North Carolina's law has been widely dubbed the "little FTC Act." Allen, N.C. Unfair Business Practice § 14.03, at 14-3; Burke, 15 Campbell L. Rev. at 223.[15]

Citing this history, this Court has frequently relied on "federal decisions interpreting the FTC Act" to determine "the scope and meaning of G.S. 75-1.1." Marshall, 302 N.C. at 542, 276 S.E.2d at 399. For example, in Johnson v. Phoenix Mutual Life Insurance Company, this Court substantially adopted the U.S. Supreme Court's definition of "unfair"—one of the Act's key terms—as it had been used in the federal FTC Act. 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980) (citing F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233 (1972)). Likewise, in Marshall, where this Court concluded that the Act does not require a showing of bad faith, the Court cited the "precedential value of

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[15] Compare N.C. Gen. Stat. § 75-1.1(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.") with 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

North Carolina was not alone in passing legislation patterned after the FTC Act. During the 1960's and 1970's, "North Carolina was one of forty-nine states to adopt consumer protection legislation" modeled on the federal law. Marshall, 302 N.C. at 543, 276 S.E.2d at 400.

FTC jurisprudence." 302 N.C. at 549, 276 S.E.2d at 403 (citing cases from several federal circuit courts).

Applying these lessons here, federal decisions also support a narrow interpretation of the learned-profession exemption's scope.

The FTC Act, like North Carolina's parallel law, is a remedial statute. See, e.g., F.T.C. v. AT&T Mobility LLC, 883 F.3d 848, 854 (9th Cir. 2018) (en banc). Thus, exemptions in the FTC Act must be strictly construed. Id.; see Calderon, 809 F.3d at 120. That same reasoning applies to the "little FTC Acts" across the nation that have been incorporated into state law. As one federal appellate court has held, all "[s]tatutes prohibiting unfair trade practices and acts" must be interpreted in a "flexible" way to achieve their consumer-protection purposes. In re Smith, 866 F.2d 576, 581 (3d Cir. 1989) (noting the "human inventiveness" that can otherwise stymie enforcement of such laws).

In sum, because the Act is a remedial statute that is designed to promote the public welfare, the learned-profession exemption must be construed narrowly.

III. The Court of Appeals Has Departed From The Text And Original Design Of The Learned-Profession Exemption.

This Court has never squarely addressed the scope of the learned-profession exemption.[16]

However, in the four decades since the 1977 amendments were enacted, the Court of Appeals has developed a wide body of case law on the exemption. Unfortunately, the Court of Appeals has construed the exemption to have a far broader sweep than the General Assembly ever intended. Specifically the Court has applied the exemption to immunize unfair and deceptive business practices that merely affect professional services, however remotely. In some cases, the Court has even held that learned professionals are categorically exempt from all unfair-and-deceptive practices claims.

Through these rulings, the Court of Appeals has expanded the reach of the exemption far beyond its text and original design.

The Court of Appeals first considered the exemption in 1982, in Cameron v. New Hanover Memorial Hospital, 58 N.C. App. 414, 293 S.E.2d

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[16] Coincidentally, the exception is also at issue in another case that is currently pending before this Court. See Sykes v. Health Network Sols., No. 251PA18 (argued March 5, 2019).

901 (1982). In Cameron, the Court of Appeals broadly read the term "professional services rendered" to include any activity that is a "necessary part of assuring" the rendering of professional services. Id. at 447, 293 S.E.2d at 921.

Thus, at the very outset, the Court of Appeals departed from the exemption's plain meaning. It read the exemption to include activities that were not professional services, so long as they were closely related to those services. Id. That relatedness principle, however, appears nowhere in the statute's text. Compounding the problem, the Court of Appeals later used the principle as a hook to dramatically expand the exemption's scope in future cases.

The Court of Appeals next addressed the exemption in 1990. See Abram v. Charter Med. Corp., 100 N.C. App. 718, 722, 298 S.E.2d 331, 334 (1990). In Abram, a drug-rehabilitation facility lobbied the state Department of Human Resources to deny another company's application for a "certificate of need" to build a competing facility. Id. at 720, 298 S.E.2d at 332-33. With little discussion or analysis, the Court held that this activity falls within the learned-profession exemption. Id. at 722, 298 S.E.2d at 334.

Abram, too, is impossible to square with the exemption's text or original design. In no way was the facility rendering a "professional service" when it lobbied against regulatory approval for a potential competitor. As one commentator explained, "it defies reality to suggest . . . that challenges to the admission of a potential competitor into the community of health care providers can be motivated solely by professional considerations, and not those of an economic nature." Burke, 15 Campbell L. Rev. at 255.

Following Abram, the Court of Appeals went even further, holding that any conduct by a member of a learned profession is exempt. See Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660. In Gaunt, a fertility specialist sued other medical professionals for allegedly making defamatory statements about him. Id. at 779-80, 534 S.E.2d at 661. The Court of Appeals rejected the unfair and deceptive practices claim solely because the defendant was a medical professional. Id. That is, the Court did hold that defamatory statements constitute "professional services rendered" under the statute. Instead, the Court categorically declared that "unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a)." Id. at 784, 534 S.E.2d at 664.

The Court of Appeals applied this new categorical rule again in Shelton v. Duke University Health System, 179 N.C. App. 120, 633 S.E.2d 113 (2006). In Shelton, a patient sued a hospital, claiming that its billing practices were unfair and deceptive. Id. at 121-23, 633 S.E.2d at 114-15. The Court of Appeals invoked the learned-profession exemption to dismiss the claim, holding that "medical professionals" are categorically exempt from unfair and deceptive practices claims. Id. at 126, 633 S.E.2d 113 at 117. The Court then went further, ruling that hospitals themselves constitute "medical professionals" under the Act. Id. Once again, the Court of Appeals did not even inquire into whether the challenged conduct constituted the rendering of professional services, as the statute's text requires. Id.[17]

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[17] In this case, this Court has not been asked to decide whether, and if so how, the exemption applies to hospitals and other entities that employ learned professionals. Even the Court of Appeals has recognized, however, that such entities cannot automatically borrow the professional status of their employees. See, e.g., Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 671, 620 S.E.2d 232, 238 (2005) (weight-loss center not a "learned professional," even though it employed medical doctors). At minimum, an entity cannot invoke the exemption based on the actions of non-professionals. Att'y Gen. Op. at 118 ("the person performing the act must be a member of a 'learned profession'").

Fortunately, the Court of Appeals' categorical holdings in Gaunt and Shelton—which wholly jettison the exemption's separate conduct requirement—have not cemented into stone. However, even when the Court of Appeals has acknowledged the exemption's conduct component, the Court has interpreted the term "professional services" so broadly as to render it meaningless.[18]

For example, in Reid v. Ayers, the Court of Appeals held that when attorneys engage in debt-collection activities on behalf of creditors, they are engaged in professional services. 138 N.C. App. 261, 267, 531 S.E.2d 231, 236 (2000). The Court reasoned that "debt collection . . . is a necessary part of the practice of debtor-creditor law." Id. However, this ruling overlooks the history of the 1977 amendments, which were specifically designed to protect consumers from abusive debt-collection practices. See supra at 5-7. Despite this history, the Court of Appeals allowed creditors to shield themselves from liability for otherwise "indefensible" debt-collection practices, simply

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[18] Although the Court of Appeals has not always followed its categorical rulings in Gaunt and Shelton, other courts have cited these cases to hold that all learned professionals are exempt from unfair and deceptive practices claims. E.g., Cohn v. Wilkes Gen. Hosp., 767 F. Supp. 111, 114 (W.D.N.C.) ("Medical professionals are not contemplated by North Carolina's prohibition of unfair trade practices"), aff'd 953 F.2d 154 (4th Cir. 1991).

by routing their collection activities through an attorney. Reid, 138 N.C. App. at 268, 531 S.E.2d at 236.

Subsequent cases went even further, holding that any conduct merely "affecting professional services . . . falls within the exception." Burgess v. Busby, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (2001) (emphasis added). Applying this new lenient standard, the Court of Appeals has immunized activities whose connection to any actual performance of professional services is exceedingly remote. For example:

- In Burgess, the Court of Appeals applied the exemption to a defendant who merely discussed professional services in a letter. 142 N.C. App. at 407, 544 S.E.2d at 11-12. Specifically, a doctor who was sued for malpractice sent letters to other doctors that discouraged them from providing treatment to the jurors on his malpractice trial. Id. at 397-98, 544 S.E.2d at 6. The Court held that the exemption applies on these facts, because the letter could conceivably have "affect[ed]" the future rendering of professional services by the doctors who received the letters. Id.[19]

[19] The U.S. Supreme Court, by contrast, has held that professionals can be liable under the FTC Act for engaging in a group boycott. See F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

- The Court of Appeals reached a similar result in Wheeless v. Maria Parham Medical Center, 237 N.C. App. 584, 768 S.E.2d 119 (2014). In Wheeless, a doctor sued a hospital claiming that the hospital had sent confidential materials about his work performance to the state Medical Board. Id. at 590-91, 768 S.E.2d at 123-24. The Court held that the exemption applies, even though the materials related only to the plaintiff's performance of medical services. Id.
- The Court of Appeals has also applied the exemption to immunize professionals from claims that they misrepresented their credentials. In Phillips v. A Triangle Women's Health Clinic, a patient alleged that a medical doctor had falsely claimed to be a board-certified specialist. 155 N.C. App. 372, 379, 573 S.E.2d 600, 604-05 (2002). The Court held that the exemption applies to any misrepresentations of this kind—even to lies made in commercial advertisements. Id.[20]

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[20] Because the Court of Appeals' opinion in Phillips drew a dissent, the patient appealed to this Court. This Court issued a one-line per curiam opinion affirming the decision below. Phillips v. A Triangle Women's Health Clinic, Inc., 357 N.C. 576, 597 S.E.2d 669 (2003). Despite this affirmance, the reasoning of the Court of Appeals is not binding precedent on this Court. See McGowan v. Davenport, 134 N.C. 526, 47 S.E. 27, 29 (1904) (per curiam opinions "merely declare[ ] the law of the particular case"); see also

In sum, the Court of Appeals has expansively interpreted the learned-profession exemption to cover any conduct that even remotely "affects" professional services. In some cases, the Court has gone so far as to disregard the second component of the exemption altogether—holding that professionals are categorically exempt from liability under the Act. Because these cases misconstrue the exemption's text, history, and purpose, the State respectfully submits that they should be overruled.

IV. The Court Of Appeals Correctly Concluded That The Learned-Profession Exemption Does Not Apply Here.

In contrast to the mistaken line of precedent described above, the decision below represents a welcome return to the exemption's text and original design.

Comptroller of Treas. of Md. v. Wynne, 135 S. Ct. 1787, 1801 (2015) ("[A] summary affirmance is an affirmance of the judgment only, and the rationale of the affirmance may not be gleaned solely from the opinion below.").

Moreover, in addition to the arguments made elsewhere in this brief, the State respectfully submits that the Court of Appeals' decision in Phillips was wrongly decided for another reason: It relied on this Court's holding in J.C. Penney that the Act applies only to "a seller" of goods. Phillips, 155 N.C. App. at 379, 573 S.E.2d at 604 (quoting J.C. Penney, 292 N.C. at 317, 233 S.E.2d at 899). But as described above, the 1977 amendments were enacted specifically to displace J.C. Penney's seller-based rationale. See supra n.3.

In this case, Dr. Pedro Hernandez claims that a hospital violated the Act by making "false representations to induce him to enter into a contract" to provide medical services. Hamlet H.M.A., LLC v. Hernandez, 821 S.E.2d 600, 608 (N.C. Ct. App. 2018). The Court of Appeals correctly held that the exemption does not apply to a claim of this kind. Id.

First, the Court observed that the hospital cannot invoke the exemption "simply because the participants in the contract are medical professionals." Id. Instead, determining whether the defendant is a learned professional is merely the first step in the analysis. Thus, even for medical doctors, the defendant must also show that the claim arises out of the rendering of professional services for the exemption to apply. Id. In so ruling, the Court of Appeals rightly distinguished its previous cases, which held that medical doctors and medical facilities are categorically exempt from liability under the Act.[21]

Next, the Court of Appeals correctly held that Dr. Hernandez's allegations here involve negotiations over a business contract—not the

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[21] The Court of Appeals did not purport to overrule its previous cases. Instead, the Court distinguished those cases by observing that they involved employment relationships, whereas Dr. Hernandez was "an independent contractor." Hamlet, 821 S.E.2d at 608. The State agrees that this is a valid distinction.

rendering of professional services. Id. These contract negotiations were not "professional" in the relevant sense, because they did not require the parties to apply their specialized medical skills or knowledge. Moreover, the parties were not "rendering" a "service" when they negotiated the contract. Neither Dr. Hernandez nor the hospital were providing medical treatment to a patient; they were discussing terms of "a business deal" for their mutual financial benefit. Id.; see id. at 602-03. Commercial conduct of this kind does not fall within the learned-profession exemption—even if the underlying purpose of the agreement was to facilitate the delivery of professional services at a later time.

In sum, the Court of Appeals was right to hold that the learned-profession exemption does not apply here, because Dr. Hernandez's allegations arise out of an ordinary commercial transaction. As the Court correctly observed, "the fact that he is a physician does not change the nature of the negotiation of a business contract." Id. at 608. If the exemption did apply here, then "any business arrangement" involving learned professions would be immune under the Act. Id. For example, the exemption would apply even to a doctor who is defrauded in the context of "a lease agreement for space in a medical office building." Id. As explained

in this brief, however, the exemption was designed to have a far narrower sweep. See supra at 5-28. Thus, the Court of Appeals was right to hold that the learned-profession exemption does not apply in this case.

Of course, the fact that the exemption does not apply here is only the first step in analyzing the merits of Dr. Hernandez's unfair and deceptive practices claim. To prevail in this case, Dr. Hernandez must satisfy all of the other elements required to prove such a claim. See N.C. Gen. Stat. § 75-16. For instance, Dr. Hernandez must prove that Hamlet's actions were actually "unfair" or "deceptive" under the statute. See Marshall, 302 N.C. at 548, 276 S.E.2d at 403 (unfair practices are those that are "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers"). If he can surmount that hurdle, Dr. Hernandez must also prove that those acts "proximately caused injury to" him. Dalton v. Camp, 353 N.C. 647, 656-57, 548 S.E.2d 704, 711 (2001). On remand, the Superior Court can address whether these or other obstacles legitimately bar Dr. Hernandez's claim.

Because of these limits, a ruling in Dr. Hernandez's favor here will not unduly expand the scope of liability against learned professionals under the Act. After all, as this Court has held, ordinary contract breaches and "run-of-the-mill employment disputes" do not fall under the Act unless they involve

"some type of egregious or aggravating circumstances." Dalton, 353 N.C. at 656-57, 548 S.E.2d at 710-11.[22]

The State takes no position on whether such egregious or aggravating circumstances are present in this case. However, the State notes that the jury found in Hamlet's favor on the merits of Dr. Hernandez's claims for fraud and breach of contract, and may well reach the same conclusion on his claim for unfair and deceptive practices. Thus, although the State shares the Healthcare Association's concern for rural hospitals, it does not believe that this concern should drive the outcome here. See N.C. Healthcare Ass'n Br. 9-11. Because the Act applies to employment disputes only in "egregious or aggravating" circumstances, Dalton, 353 N.C. at 656-57, 548 S.E.2d at 710-11, a hospital's good-faith recruitment of a physician to a rural community will rarely, if ever, give rise to liability under the Act.

CONCLUSION

The State of North Carolina, acting through Attorney General Joshua H. Stein, respectfully requests that this Court affirm the judgment below.

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[22] The ability of a defendant to recover attorney fees against a plaintiff who brings a frivolous or malicious action provides a further safeguard against unwarranted exposure for learned professionals under the Act. See N.C. Gen. Stat. § 75-16.1(2).

This 8th day of May, 2019.

JOSHUA H. STEIN
Attorney General

Electronically submitted
Ryan Y. Park
Deputy Solicitor General
N.C. State Bar No. 52521
rpark@ncdoj.gov

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

K. D. Sturgis
Special Deputy Attorney General
State Bar No. 9486
ksturgis@ncdoj.gov

Daniel P. Mosteller
Special Deputy Attorney General
State Bar No. 36958
dmosteller@ncdoj.gov

Laura H. McHenry
Assistant Attorney General
N.C. State Bar No. 45005
lmchenry@ncdoj.gov

North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602
(919) 716-6400
(919) 716-0135 (fax)

CERTIFICATE OF SERVICE

I certify that today, I served a copy of this brief by email on counsel of record for all parties to this case:

Mark L. Hayes
Law Office of Mark L. Hayes
P.O. Box 51387
Durham, NC 27717
(919) 926-7878
markhayes@appealnc.com

Counsel for Defendant-Appellee Dr. Pedro Hernandez

William S. F. Freeman
Freeman & Freeman, LLC
P.O. Box 383
Greenville, SC 29602
(864) 478-8878
william@freemanfreemanlaw.com

Counsel for Plaintiff-Appellant Hamlet H.M.A., LLC D/B/A Sandhills Regional Medical Center

Linwood L. Jones
North Carolina Healthcare Association
P.O. Box 4449
Cary, NC 27519-4449
ljones@ncha.org

Counsel for Amicus North Carolina Healthcare Association

This 8th day of May, 2019.

/s/ Ryan Y. Park